

The ruling you have requested has been amended as a result of litigation and has been attached to this document.



OFFICE *of the* ATTORNEY GENERAL
GREG ABBOTT

April 22, 2003

Mr. Joe Farmer
Executive Director
Region 10 Education Service Center
P.O. Box 831300
Richardson, Texas 75083-1300

OR2003-2662

Dear Mr. Farmer:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 179238.

The Region 10 Education Service Center (the "center") received a request for access to the database for TEKS related assessment items, including the following:

- 1) Immediate access to an electronic version of the questions in their currentstate;
- 2) A procedure whereby we can update our version of the items to accommodate changes that are made to the items or add additional items that are created under the same funding mechanism;
- 3) Documentation and/or descriptive information about items including TEKS alignment, correct answers, scoring rubrics, etc.; and
- 4) Any and all written documentation between or among Region 10, Chapter 41 and/or Chapter 42 Texas Public School Districts, including any minutes for meetings of the "Consortium for Innovation" or other documentation from the Consortium which addresses any aspect of the development of TAKS benchmark assessment items utilizing Chapter 41 Consortium funds.

You claim that a portion of the requested information is excepted from disclosure under section 552.122 of the Government Code. We have considered the exception you claim and reviewed the submitted representative sample of information.¹ We have also considered comments submitted to this office by the requestor. *See* Gov't Code § 552.304 (providing that interested party may submit comments stating why information should or should not be released).

Initially, we note that the only information you have submitted for our review is the requested assessment items from the TEKS databank. To the extent they exist, we assume that you have released any additional documents that are responsive to the instant request for information. If not, you must do so at this time. *See* Gov't Code §§ 552.301, .302; *see also* Open Records Decision No. 664 (2000) (noting that if governmental body concludes that no exceptions apply to requested information, it must release information as soon as possible).

Also, the requestor raises several issues regarding the center's allocation of "Chapter 41 funds." However, whether the center has improperly used such funds presents a question of fact. This office cannot resolve disputes of fact in its decisional process. *See* Open Records Decision Nos. 592 at 2 (1991), 552 at 4 (1990), 435 at 4 (1986). Additionally, in regard to item two of the request for information, we note that the Public Information Act (the "Act") does not require the center to disclose information that did not exist at the time the request was received. *Economic Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex. Civ. App.--San Antonio 1978, writ dismissed); Open Records Decision No. 452 at 3 (1986). Further, the Act does not require the center to inform the requestor if the requested information comes into existence after the request has been made or to produce the responsive information in the format requested. *AT&T Consultants, Inc. v. Sharp*, 904 S.W.2d 668, 676 (Tex. 1995); *Fish v. Dallas Indep. Sch. Dist.*, 31 S.W.3d 678, 681 (Tex. App.--Eastland, pet. denied); Attorney General Opinion H-90 (1973); Open Records Decision Nos. 452 at 2-3, 342 at 3 (1982), 87 (1975). Also, the center is not required to comply with a continuing request to supply information on a periodic basis as such information is prepared in the future. *See* Open Records Decision Nos. 476 at 1 (1987), 465 at 1 (1987).

Finally, we address the center's obligations under section 552.301 of the Government Code. Pursuant to section 552.301(b), a governmental body must ask for a decision from this office and state the exceptions that apply not later than the tenth business day after the date of receiving the written request. Further, pursuant to section 552.301(e), a governmental body is required to submit to this office within fifteen business days of receiving an open records request (1) general written comments stating the reasons why the stated exceptions apply that would allow the information to be withheld, (2) a copy of the written request for

¹We assume that the "representative sample" of records submitted to this office is truly representative of the requested records as a whole. *See* Open Records Decision Nos. 499 (1988), 497 (1988). Here, we do not address any other requested records to the extent that those records contain substantially different types of information than that submitted to this office.

information, (3) a signed statement or sufficient evidence showing the date the governmental body received the written request, and (4) a copy of the specific information requested or representative samples, labeled to indicate which exceptions apply to which parts of the documents. Upon review of the request for information and documents submitted by the requestor, it is apparent that the requestor submitted a previous request for the same assessment items from the TEKS databank on November 8, 2002. Pursuant to section 552.303(c) of the Government Code, on April 14, 2003 this office sent a notice to you via facsimile requesting that you provide further information regarding this previous request. In your response of April 14, 2003, you acknowledge that the center received the previous request for information on November 11, 2002. In your response to the requestor in a letter dated November 20, 2002, which you submitted to this office, you denied the requestor access to the assessment items in the test bank under section 552.122 of the Government Code, copyright law, and certain proprietary concerns. However, you failed to request a decision from this office regarding your claimed exceptions pursuant to section 552.301 of the Government Code with respect to the initial request. You did not seek a decision from this office with respect to the requested assessment items until February 4, 2003, after receiving the requestor's January 16, 2003 request for the same information.

Pursuant to section 552.302 of the Government Code, a governmental body's failure to comply with section 552.301 results in the legal presumption that the requested information is public and must be released unless the governmental body demonstrates a compelling reason to withhold the information from disclosure. *See* Gov't Code § 552.302; *Hancock v. State Bd. of Ins.*, 797 S.W.2d 379, 381-82 (Tex. App.--Austin 1990, no writ) (governmental body must make compelling demonstration to overcome presumption of openness pursuant to statutory predecessor to Gov't Code § 552.302); Open Records Decision No. 319 (1982). Normally, a compelling reason for non-disclosure exists where some other source of law makes the information confidential or where third party interests are at stake. Open Records Decision No. 150 at 2 (1977). Section 552.122 is a discretionary exception under the Act and does not demonstrate a compelling reason to withhold information from the public. *See* Open Records Decision No. 665 at 2 n.5 (2000) (discretionary exceptions in general). Thus, the submitted information may not be withheld under section 552.122 of the Government Code. Additionally, you have not directed our attention to any other law, nor are we aware of any law, under which the information in question is considered to be confidential. *See, e.g.*, Open Records Decision Nos. 600 at 4 (1992) (constitutional privacy), 478 at 2 (1987) (statutory confidentiality), 611 at 1 (1992) (common-law privacy). Consequently, the submitted information must be released to the requestor.

We note, however, that the requested information in the TEKS databank may be copyrighted. If so, a custodian of public records must comply with the copyright law and is not required to furnish copies of records that are copyrighted. Attorney General Opinion JM-672 (1987). A governmental body must allow inspection of copyrighted materials unless an exception applies to the information. *Id.* If a member of the public wishes to make copies of

copyrighted materials, the person must do so unassisted by the governmental body. In making copies, the member of the public assumes the duty of compliance with the copyright law and the risk of a copyright infringement suit. *See* Open Records Decision No. 550 (1990).

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at (877) 673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Dep't of Pub. Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Texas Building and Procurement Commission at (512) 475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,



W. Montgomery Meitler
Assistant Attorney General
Open Records Division

WMM/lmt

Ref: ID# 179238

Enc: Submitted documents

c: Mr. Paul T. Haeberlen
President
Campus Online, Inc.
P.O. Box 17281
Sugar Land, Texas 77496
(w/o enclosures)

COPY

CAUSE NO. GN301720

REGION 10 EDUCATION SERVICE
CENTER

Plaintiff,

v.

GREG ABBOTT, ATTORNEY GENERAL
OF TEXAS

Defendant.

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IN THE DISTRICT COURT

TRAVIS COUNTY, TEXAS

201ST JUDICIAL DISTRICT**AGREED FINAL JUDGMENT**

On this day came to be heard the above entitled and numbered cause wherein Region 10 Education Service Center ("Region 10") is plaintiff, Gregg Abbott, Attorney General of Texas ("Attorney General") is defendant and Campus Online, Inc., ("Campus Online") is intervenor. The parties appeared by and through their respective attorneys of record and announced to the Court that they are agreeing to this final judgment as Ordered and Decreed by the Court below. Intervenor agreed to and withdrew its jury demand so that all questions of law and fact were submitted to the Court. The making of a record is waived by consent of all of the parties.

This case was initially filed by Region 10 under the Public Information Act, TEX. GOVT. CODE ANN. Ch. 552 (Vernon 1994 and Supp. 2004) (the "PIA") seeking declarations that certain information, including Region 10's WebCCAT test item bank developed by Region 10, was excepted from disclosure under the PIA. Campus Online, the requester of the information, intervened in this action under the PIA.

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Ursula Rodriguez-Hernandez
DISTRICT CLERK
TRAVIS COUNTY, TEXAS

On June 14, 2004, the Court heard the motions for summary judgment filed by Region 10 Education Service Center and the intervenor, Campus Online. On July 19, 2004, the Court entered an Interlocutory Summary Judgment. The parties now agree that the Interlocutory Judgment should become final. Accordingly, it is ORDERED, ADJUDGED AND DECREED THAT:

1. Region 10's petition for declaratory judgment is GRANTED. The court declares: Although Campus Online's November 8, 2002, letter triggered obligations for Region 10 under the Public Information Act (the "PIA"), Region 10 has demonstrated a compelling reason to withhold the requested information under PIA § 552.122, that is, the interests of other governmental bodies. Accordingly, Region 10's WebCCAT test item bank, that is WebCCAT's electronic Item Database and updates to the Item Database are exempt from disclosure under the PIA. This declaration is a previous determination on the WebCCAT test item bank for purposes of PIA §552.301(a).
2. Campus Online's motion for summary judgment is DENIED.
3. All parties will bear their own costs of court and attorneys' fees.
4. All parties acknowledge and agree this is a Final Judgment in this matter.
5. All parties agree to not appeal and therefore the parties waive appeal of this final judgment.

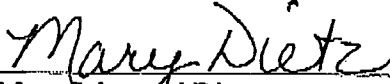
6. All other relief claimed in the above numbered and entitled suit not expressly granted herein, is hereby denied.

Dated: 11th Aug 2004

Honour Patrick Keel
JUDGE PRESIDING

AGREED AS TO FORM AND SUBSTANCE::

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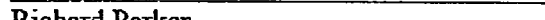
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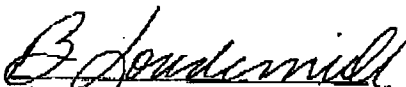
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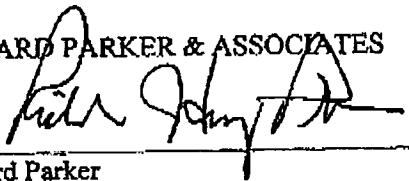
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